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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1161

THE TIMES-MIRROR COMPANY, A CORPORATION; NORMAN CHANDLER, R. F. MARX, J. J. COHEN, AND A. A. KURZE, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
T. B. COSGROVE,
Counsel for Petitioners.

JOHN N. CRAMER,
J. D. BARNUM, JR.,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1161

THE TIMES-MIRROR COMPANY, A CORPORATION; NORMAN CHANDLER, R. F. MARX, J. J. COHEN, AND A. A. KURZE, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Times-Mirror Company, a corporation, Norman Chandler, R. F. Marx, J. J. (Jerry) Cohen, and A. A. Kurze respectfully petition for a Writ of Certiorari to review an Order of the Circuit Court of Appeals for the Ninth Circuit dated March 10, 1947, adjudging each of your petitioners in contempt for having failed to comply with, violated, and disobeyed a Decree of said Circuit Court of Appeals dated June 14, 1944.

A

Concise Statement of the Matter Involved

The Petitioners herein; The Times-Mirror Company, a corporation, publishes the Los Angeles Times, a newspaper of general circulation in Los Angeles; Norman Chandler is president of said corporation and publisher of Los Angeles Times; R. F. Marx is circulation manager; A. A. Kurze is city circulation manager; and J. J. Cohen is supervisor of street sales, of Los Angeles Times (Pet., p. 3).

This Court, in *N.L.R.B.* vs. *The Times-Mirror Company*, 322 U.S. 111, reversed the judgment of the Ninth Circuit Court of Appeals in *The Times-Mirror Company, a corporation*, vs. *N.L.R.B.*, 136 Fed. (2d) 608. Pursuant to mandate of this Court, said Circuit Court of Appeals issued its Decree dated June 14, 1944 ordering The Times-Mirror Company, its officers and agents to cease and desist from refusing to bargain collectively with Los Angeles Newsboys Local Industrial Union No. 75, C.I.O., as the exclusive bargaining representative of The Times-Mirror Company employees who are newsboys engaged in the street sale of Los Angeles Times, and upon request to bargain collectively with said Union as the exclusive representative of said newsboys (R.—Pet., pp. 25, 26, Exh. A).

Collective bargaining negotiations were first suggested by said Union on July 14, 1944 (R.—Pet., p. 63, Exh. B-1); and continued thereafter with various brief and some extended interruptions until September 10, 1946.

On September 10, 1946, National Labor Relations Board filed with said Circuit Court of Appeals a Petition for Rule to Show Cause and for an Order Adjudging Petitioners in Contempt for Disobedience of said Decree of June 14, 1944 (R. Pet. of N.L.R.B.). An Order to Show Cause was issued January 13, 1947, returnable February 14, 1947 (R.—Order

to Show Cause). The verified Answer and supporting Affidavits of Petitioners herein, hereafter called "Return," were served and filed on, to wit, February 3, 1947 (R.—Return). Motion of the Board for Adjudication on the Pleadings, for Summary Adjudication, and for Alternate Procedure was served and filed on, to wit, February 9, 1947 (R.—Notice of Motion). Following argument on return day of the Motion for Summary Adjudication, the Circuit Court of Appeals on March 10, 1947, filed its Order (R.—Order), adjudging petitioners herein in contempt. No order of reference had been made. No findings or opinion of the Court accompanied the Order. Petition for a stay of the execution and enforcement of the Order of March 10, 1947, to enable Petitioners herein to apply for a Writ of Certiorari was duly and regularly made on March 13, 1947, and on said date was order denied (R.—Order Denying Petition for Stay of Enforcement). Thereupon Petition for Stay of Execution and Enforcement of said Order was filed in this Court on March 15, 1947. At Special Term this Court on said date entered an Order staying the execution and enforcement of the Order of said Circuit Court of Appeals upon condition that on or before March 28, 1947, petitioners file with this Court their Petition for Writ of Certiorari to review the Order of March 10, 1947, of said Circuit Court of Appeals and upon further condition that petitioners herein file bond in the sum of five thousand dollars, to be approved by a judge of said Circuit Court of Appeals.

B

Statement Disclosing Basis of Jurisdiction

1. Jurisdiction is invoked under the provisions of Section 347 (a) of Title 28 of the United States Code.

2. The Order of the Circuit Court of Appeals for the Ninth Circuit was entered March 10, 1947. Petition to said Circuit Court of Appeals for stay of enforcement of order, timely made, was denied March 13, 1947. Upon application of petitioners herein order staying the execution and enforcement of said Order of the Circuit Court of Appeals was entered by the United States Supreme Court at Special Term Saturday, March 15, 1947. A bond in the sum of five thousand dollars, with good and sufficient surety, required by said Order of the Supreme Court of the United States was filed by petitioners herein and approved by a judge of the United States Circuit Court of Appeals for the Ninth Circuit on Monday, March 17, 1947. Petitioners herein have not, neither has any one or more of them, complied with said Order of said Circuit Court of Appeals of March 10, 1947, or any part thereof.

3. The Order of March 10, 1947, entered upon the Board's Motion for Adjudication on the Pleadings and for Summary Adjudication, without any findings or opinion in support of said Order, is in conflict with decisions of other Circuit Courts of Appeals; decides, without taking evidence or making findings, controverted material issues; decides important questions of federal law in summary proceedings in a way probably in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeals; and has so far departed from the accepted and usual course of judicial proceedings in such matters as to call for the exercise of the power of supervision of this Court.

4. The following cases establish jurisdiction:

Gay v. *Ruff*, 292 U. S. 25, 30;
Forsyth v. *Hammond*, 166 U. S. 506, 513.

C

The Questions Presented

Broadly stated, the question presented is:

Where the Board's Petition and Affidavits and the Petitioners' Answer and Affidavits disclose that collective bargaining negotiations had been conducted over a period exceeding two years, but the Board's Petition and Affidavits allege that such negotiations had been conducted by the Petitioners in bad faith, and numerous acts and omissions of the Petitioners are alleged by the Board to constitute bad faith, all of which acts and omissions are denied or are not admitted in the Petitioners' Answer and Affidavits; may the Court summarily adjudge Petitioners in contempt for having negotiated in bad faith and direct Petitioners, under penalty of attachment and imprisonment, to bargain collectively in good faith, without making findings or filing opinion identifying the acts or omissions alleged in the pleadings which the Court adjudges constitute bad faith?

Relevant to the solution of the foregoing question are the following questions:

Upon the Motion of National Labor Relations Board for Adjudication on the Pleadings and for Summary Adjudication of constructive civil contempt,[1]

(a) Was it necessary that the Court's order summarily adjudging Petitioners in contempt for failing to bargain collectively in good faith recite the facts that constituted contempt or identify the particular acts or omissions of Petitioners which are adjudged contumacious?

(b) Should all reasonable intendments and inferences from the pleadings as a matter of law have been

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[1] *N. L. R. B. v. Whittier Mills Co.*, 123 F. (2d) 725, 727.

resolved against National Labor Relations Board and in favor of Petitioners?

(c) Must the facts relied upon to support the Order of Contempt be admitted or not denied by Petitioners?

(d) Should the Court have found the Petitioners in contempt if any facts relied upon to support the Order are denied or are not admitted in Petitioners' Return?

(e) If any fact material to the finding of contempt is denied or stands unadmitted, should the Board have been required to prove its charges by competent and material evidence?

(f) Should the issues of fact tendered by the allegations of the Petition of the Board and joined by the denials of the Answer of Petitioners have been decided upon conflicting statements in the Affidavits?

(g) Should the question of whether the Petitioners herein have disobeyed a Decree of the Court and the further question of whether disobedience, if any, is technical and inadvertent, or substantial and deliberate, have been determined from evidence or from conflicting allegations of the pleadings and contradictory statements of the Affidavits?

D

Reasons Relied upon for the Allowance of the Writ

The Order of the Circuit Court of Appeals dated March 10, 1947 (R. — Order), summarily adjudging petitioners herein in contempt, without findings or opinion, and being in scope and effect precisely the same and in several paragraphs identical with the prayer of the Board's Petition (R. — Pet., pp. 20 to 24), compels the conclusion that the allegations of the Board's Petition were taken as true by the

Circuit Court of Appeals in its consideration of the Board's Motion for Summary Adjudication of Contempt. The Record discloses that the Answer to the Board's Petition denies the material allegations of the Petition. The Answer and supporting Affidavits do not admit material facts necessary to support the Order of Contempt. The Order of Contempt (R. — Order), under penalty of attachment and imprisonment, directs petitioners herein to bargain collectively in good faith with the Union. The Board's printed Petition of 287 pages and the typewritten Return of 192 pages contain many verified allegations wherein the Board alleges failure to bargain in good faith over a period exceeding two years. The petitioners herein in their Return deny these allegations and allege that during said period they have bargained in good faith. The Affidavits attached to the Petition allege the occurrence of many material circumstances and events occurring during said period. The counter Affidavits attached to the verified Answer deny those statements of material facts. In addition, the Affidavits attached to the Answer aver material facts not referred to in the Board's Petition or Affidavits in support thereof. The Order imposes a penalty of attachment, fine, or imprisonment on the petitioners for failure to bargain collectively in good faith. The issues of good faith tendered and joined in the Petition and Answer remain unsolved by the Order. These issues the petitioners at their peril must determine without benefit of findings or opinion of the Court.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the Order of March 10, 1947, may be reviewed and determined by this Court as provided by the statutes of the United States; and that said Order of said

Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated March 25th, 1947.

THE TIMES-MIRROR COMPANY,
a Corporation,
NORMAN CHANDLER,
R. F. MARX,
J. J. COHEN,
A. A. KURZE,
Petitioners,

By ELISHA HANSON,
T. B. COSGROVE,
Counsel for Petitioners.

JOHN N. CRAMER,
J. D. BARNUM, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1161

THE TIMES-MIRROR COMPANY, A CORPORATION; NORMAN CHANDLER, R. F. MARX, J. J. COHEN, AND A. A. KURZE,

vs. *Petitioners,*

NATIONAL LABOR RELATIONS BOARD,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

No opinion or findings was filed by the United States Circuit Court of Appeals for the Ninth Circuit. The Order of Contempt which the petitioners herein seek to have reviewed, dated March 10, 1947, appears in the record, certified by the Clerk of said Court (R. — Order). It contains nothing more than a brief statement of appearances, submission, adjudication of contempt and direction to petitioners to purge themselves, under penalty of attachment and confinement.

II

Jurisdiction

The basis of jurisdiction is given under heading "B" in the petition for Writ of Certiorari (*ante*, B, p. 1), and in the interest of brevity is incorporated here by reference.

III

Statement of the Case

A concise statement of the case appears under heading "A" in the Petition for Writ of Certiorari (*ante*, A, p. 2) and in the interest of brevity is incorporated here by reference.

IV

Specification of Errors

The United States Circuit Court of Appeals for the Ninth Circuit erred:

(1) In adjudging petitioners herein guilty of constructive civil contempt [2] in summary proceedings without findings or opinion, upon conflicting, verified allegations of materials facts essential to support the order of contempt.

(2) In failing to accept as true the material allegations of petitioners' Answer and affidavits attached thereto.

(3) In accepting as true the material allegations of the Board's Petition, although denied and not admitted in petitioners' Return.

(4) In failing to require the Board to prove by competent and material evidence the material allegations of

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[2] *National Labor Relations Board* v. *Whittier Mills Co.* (C. C. A. 5), 123 F. (2d) 725, 727.

its Petition which were denied or which were not admitted in petitioners' Return.

(5) In denying petitioners herein the privilege of confronting the Board's witnesses, cross-examining them, and adducing evidence to disprove the material allegations of the Petition which were denied or not admitted in the Answer.

(6) In deciding the issues of fact joined in the pleadings material to the charge of contempt, upon such pleadings and the supporting affidavits.

(7) In deciding, upon conflicting allegations of the pleadings and contradictory statements of the supporting affidavits, that petitioners herein had committed substantial and deliberate contempt of a decree of the Court.

(8) In resolving the issues of fact joined in the pleadings and supporting affidavits in favor of the Board and against petitioners herein.

(9) In failing to resolve all reasonable intendments and inferences from the pleadings in favor of petitioners herein.

(10) In directing petitioners herein to bargain in good faith without findings or opinion identifying the controverted acts or omissions of petitioners occurring over a period exceeding two years of collective bargaining which in the Court's opinion constitute bargaining in bad faith.

V

Summary of the Argument

(1) The Court erred in finding petitioners herein guilty of contempt in a summary proceeding, without reference, without findings, and without opinion, where the pleadings upon which the contempt order is based, by appropriate

denials under oath in petitioners' Return, put in issue the material allegations of fact necessary to support the order of contempt.

(2) The material facts alleged in the Petition necessary to sustain the contempt order are denied in the Answer.

(3) The facts alleged in the Petition and admitted in the Answer do not sustain the order of contempt.

Point I

The Court erred in finding petitioners guilty of contempt in a summary proceeding without reference, without findings, and without opinion, where the pleadings upon which the contempt order is based, by appropriate denials under oath in the petitioners' return, put in issue the material allegations of fact necessary to support the order of contempt.

Where the pleadings join issue upon allegations of material facts necessary to sustain a contempt order, the Court may not in summary proceedings resolve the issues against the party respondent. In such instance the movant is required to prove its charges by competent and material evidence. In such case all reasonable intendments and inferences from the pleadings as a matter of law must be taken against the movant and in favor of the opponent.[3] If any facts relied upon to support the Motion for Summary

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[3] *National Labor Relations Board* v. *Weirton Steel Co.*, (C. C. A. 3), 146 F. (2d) 144, 145;

Royal Arcanum v. *Behrend*, 247 U. S. 394, 401;

Cohn v. *Kramer* (C. C. A. 6), 136 F. (2d) 293, 295;

Palmer v. *Associates D. Corp.* (U. S. C. A. D. C.), 124 F. (2d) 225, 226;

Cohn v. *Klein*, 209 Cal. 421, 424, 287 Pac. 459, 460;

F. R. C. P. 56(e).

Adjudication are not admitted in the Answer, the Court may not find the opponent in contempt.[4] The Board should have been required to prove any facts material to the finding of contempt which were denied or which stood unadmitted in the Answer.[5] Respecting charges in the Board's Petition necessary to sustain the Order of Contempt, and which are denied in the Return, petitioners should have been accorded the privilege of confronting the Board's witnesses, cross-examining them, and offering evidence to disprove such charges.[6] The conflicting allegations created an issue on material facts necessary to sustain the Order and such issue should not have been decided upon the pleadings or the Affidavits.[7] The Order finding petitioners herein guilty of substantial and deliberate contempt may not be determined in a summary proceeding without opinion or findings from conflicting allegations of the pleadings and contradictory statements of the Affidavits.[8]

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[4] *National Labor Relations Board* v. *Whittier Mills Co.* (C. C. A. 5), 123 F. (2d) 725, 727.

[5] *National Labor Relations Board* v. *Rath Packing Co.* (C. C. A. 8), 123 F. (2d) 684, 685;

"Judgment on the pleadings could not be substituted for such proof." *Best & Co.* v. *Wolf Co.*, 67 Colo. 42, 185 Pac. 371, 29 A. L. R. 899, at 905.

[6] *National Labor Relations Board* v. *Rath Packing Co.* (C. C. A. 8), 123 F. (2d) 684, 685;

National Labor Relations Board v. *Little Rock Furniture Mfg. Co.* (C. C. A. 8), 123 F. (2d) 868, 871;

Compare *Cohn* v. *Kramer* (C. C. A. 6), 136 F. (2d) 293, 295;

[7] *National Labor Relations Board* v. *Rath Packing Co.* (C. C. A. 8), 123 F. (2d) 684, 685;

National Labor Relations Board v. *Little Rock Furniture Mfg. Co.* (C. C. A. 8), 123 F. (2d) 868, 871.

[8] *National Labor Relations Board* v. *Rath Packing Co.* (C. C. A. 8), 123 F. (2d) 684, 685;

National Labor Relations Board v. *Weirton Steel Co.* (C. C. A. 3), 146 F. (2d) 144, 145;

Cohn v. *Kramer* (C. C. A. 6), 136 F. (2d) 293, 295.

POINT 2

The material facts alleged in the petition and supporting affidavits necessary to sustain the contempt order are denied in the answer and supporting affidavits.

All the allegations of the Petition excepting paragraphs I, II and III and subparagraphs 7, 8, 11 and 14 of paragraph IV of the Petition are denied in the Third Defense of the Answer (R. Return, p. 3, lines 11 to 18).

The general allegation in the Petition charging refusal of petitioners to bargain collectively in good faith (R. Pet., pp. 4, 5) is denied:

In the Answer:

Fourth Defense—pars. 7 to 13 incl., and par. 15 (R. Return, pp. 7 to 12) and

In the supporting Affidavits:

R. F. Marx—(R. Return, p. 83, lines 6 to 10, and p. 118, lines 4 to 6);

A. A. Kurze—(R. Return, p. 126, lines 11 to 16, and p. 145, line 24 to p. 146, line 3);

J. J. Cohen—(R. Return, p. 152, lines 8 to 12, and p. 169, lines 7 to 12 and 20 to 26).

The material allegations of the Petition and supporting Affidavits charging specific facts which if admitted would tend to prove the general allegation of a refusal to bargain in good faith are likewise denied, e.g.:

The Petition alleges:

1. That on September 6, 1945, the negotiating committees of the Union and of Times-Mirror Company agreed upon and concluded the terms of a contract and agreed to set a date for the signing of the contract; that The Times-Mirror Company and its negotiating committee later repudiated

the contract upon a diversity of conflicting grounds and inconsistent and captious objections, and refused to sign this agreement (R. Pet., pars. 19 to 22, incl., pp. 14 to 16, incl.; par. 25, p. 18).

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—pars. 13, 14 and 21 (R. Return, pp. 10, 11, and 17, 18) and

In the supporting Affidavits:

R. F. Marx—(R. Return, pars. 20 to 24, incl., pp. 99 to 102; par. 38, p. 119, lines 10 to 16; and par. 30, p. 109, lines 2 to 7);

A. A. Kurze—(R. Return, pars. 14 to 17, incl., pp. 134 to 136; par. 27, p. 147, lines 10 to 16);

J. J. Cohen—(R. Return, pars. 12 and 13, pp. 159, 160; par. 23, p. 169, lines 13 to 19; par. 27, p. 171, lines 23 to 25; par. 28, p. 172, line 26 to p. 173, line 3; par. 35, p. 176).

2. That

"On March 23, 1945, the Union advised respondents that the 'Amended Draft of Contract' represented the terms *actually agreed upon by the respective bargaining committees* by March 16, 1945" (R. Pet., par. 6, p. 7).

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—par. 8 (R. Return, p. 8, lines 5 to 9) and

In the supporting Affidavit:

Beatrice McCormick—(R. Return, par. 2, p. 179, lines 20 to 26).

3. That

"Respondent corporation, since July 14, 1944, has carried on negotiations with the Union through subordinate officials or representatives who were without authority to commit or bind respondent corporation to terms agreed to in the bargaining conferences or to sign a contract on behalf of respondent corporation embodying such terms" (R. Pet., par. 27, p. 19).

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—par. 23 (R. Return, pp. 19,20) and

In the supporting Affidavits:

Norman Chandler—(R. Return, pars. 2 and 3, p. 45, line 20 to p. 47, line 12).

R. F. Marx—(R. Return, par. 2, p. 81, line 17, to p. 82, line 19; par. 5, p. 84, lines 2 to 9).

A. A. Kurze—(R. Return, par. 2, p. 124, line 21 to p. 125, line 25; par. 4, p. 126, lines 16 to 23).

J. J. Cohen—(R. Return, par. 2, p. 150, line 18 to p. 151, line 21; par. 4, p. 152, lines 12 to 20). and

In the Petition:

Exhibit C-32, pp. 256, 257.

4. That

—"Although the Decree directs respondent corporation to bargain collectively with the Union 'as the exclusive representative of its employees who are newsboys engaged in the street sale of the Times in established spots four or more hours a day five or more days a week within Los Angeles and Glendale,' the respondent, in derogation of the Decree, offered recognition

to the Union as exclusive representative of the corporation's employees 'who are engaged exclusively in the street sale of the Times' in the hours therein described" (R. Pet., par. 9, pp. 7, 8).

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—par 20 (R. Return, p. 17, lines 16 to 24) and

In the supporting Affidavits:

R. F. Marx—(R. Return, par 12, p. 92, lines 12 to 22; par. 38, p. 118, lines 10 to 17);

A. A. Kurze—(R. Return, par. 8, p. 129, lines 8 to 18; par. 27, p. 146, lines 1 to 3);

J. J. Cohen—(R. Return, par. 8, p. 155, lines 3 to 14; par. 26, p. 170, lines 18 to 23); and

In the Petition:

Exhibit B-29, Article 13, Secs. 2 and 4, pp. 126, 127.

5. That the petitioners herein resorted to dilatory and evasive maneuvers and inconsistent and captious objections to delay and prevent bona fide collective bargaining. More particularly, the charges are

(a) That

"1. From July 14, 1944, the date on which the Union requested respondents to bargain collectively with it, to December, 1944, respondents resorted to dilatory and evasive maneuvers calculated to and which in fact did delay negotiations and prevent genuine collective bargaining from taking place * * *."

"2. On and after October 9, 1944, respondents refused to meet with a negotiating committee represent-

ing the Union which had among its members any person who was not a member of the Union * * *."

"3. As a result of respondent's conduct described in 1 and 2 above, representatives of respondent did not meet with representatives of the Union for the purpose of collective bargaining until the latter part of December, 1944, over five months after the Union had requested respondents to bargain collectively with it * * *."

(R. Pet., pars. 1, 2 and 3, p. 5.)

These allegations of the Petition are denied:

In the Answer:

Fourth Defense—pars. 3 to 7, incl., and 23 (R. Return, p. 4, line 23 to p. 7, line 25 and p. 19, lines 9 to 12) and

In the Supporting Affidavits:

R. F. Marx—(R. Return, pars. 4 to 6, incl., p. 83, line 11 to p. 87, line 23; par. 38, p. 118, lines 7 to 17);

A. A. Kurze—(R. Return, par. 4, p. 126, line 16 to p. 128, line 11; par. 27, p. 146, lines 4 to 7);

J. J. Cohen—(R. Return, par. 4, p. 152, line 13 to p. 154, line 8; par. 24, p. 170, lines 1 to 7);

T. B. Cosgrove—(R. Return, par. 4, p. 183, lines 17 to 24).

(b) That

"On May 23, 1945, respondent Marx and respondent corporation's counsel, Cosgrove, indicated to Union Secretary Lueb that they desired to use the Union's contract with two Los Angeles evening newspapers (Exhibit B-30) as the basis for their own agreement with the Union. Using the above as a pretext, respondents embarked upon a series of dilatory and evasive maneuvers which delayed all meetings between the respective

bargaining committee until July 24, 1945 * * *." (R. Pet., par. 12, p. 9.)

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—pars. 10 and 11 (R. Return, pp. 8, 9) and

In the supporting Affidavits:

R. F. Marx—(R. Return, pars. 13 and 14, p. 93, line 11 to p. 96, line 16; par. 38, p. 118, lines 7 to 10);

T. B. Cosgrove—(R. Return, pars. 5 to 8, incl., p. 184, line 16 to p. 186, line 16).

(c) That "Cosgrove, at the same time he was disclaiming authority to negotiate for respondent corporation, attempted to have negotiations reopened and offered inconsistent and captious objections to the form and substance of the contract agreed to by the respective bargaining representatives on September 6, 1945 * * *."

(R. Pet., subpar. D, p. 16.)

This allegation of the Petition is denied:

In the supporting Affidavit:

T. B. Cosgrove—(R. Return, par. 4, p. 183; par. 10, p. 187).

6. That

"Respondents failed and refused to submit counter-proposals as they had agreed to do between December, 1944, and February, 1945 (4. above), or to submit a contract embodying the points agreed upon on March 16, 1945, or to submit a contract embodying the points agreed upon on March 16, 1945 * * *."

(R. Pet., par. 5, p. 6.)

This allegation of the Petition is denied:

In the Answer:

Fourth Defense—pars. 7 to 9, inc. (R. Return, p. 7, line 14 to p. 8, line 19) and

In the supporting Affidavits:

R. F. Marx—(R. Return, pars. 9 to 12, incl., p. 89, line 2 to p. 93, line 11; par. 38, p. 118, line 25 to p. 119, line 4);

A. A. Kurze—(R. Return, pars. 6 to 8, incl., p. 128, line 18 to p. 130, line 23; par. 27, p. 146, line 24 to p. 147, line 2);

J. J. Cohen—(R. Return, pars. 6 to 8, incl., p. 154, line 15 to p. 156, line 10; par. 25, p. 170, lines 15 to 18).

In the Petition:

Exhibit B-29, pp. 113 to 127.

7. That

"At that meeting [March 16, 1945] respondent Marx said he would have counsel for respondent corporation prepare a contract embodying the proposals thus far agreed upon between the respective committees for the respondent corporation and the Union" (R. Pet., par. 4, p. 6).

This allegation of the Petition is denied:

In the supporting Affidavits:

R. F. Marx—(R. Return, par. 38, p. 118, line 25 to p. 119, line 4);

A. A. Kurze—(R. Return, par. 27, p. 146, lines 16 to 23 and p. 146, line 26 to p. 147, line 2);

J. J. Cohen—(R. Return, par. 25, p. 170, lines 11 to 15.)

8. That

> "At a meeting of the respective bargaining committees on July 24, 1945, it was agreed to: * * * (c) 'combine all corners,' i.e., give the newsboy at each established spot the right to sell not only respondent corporation's newspaper but other newspapers published in Los Angeles, free of the competition of another newsboy placed at the same spot by respondent corporation for the purpose of selling only its newspaper (a practice called 'splitting corners')" (R. Pet., par. 13, pp. 9, 10).

The allegation that agreement was reached to "combine all corners" is denied:

In the Answer:

> Fourth Defense—par. 13 (R. Return, p. 10, lines 10 to 15) and

In the supporting Affidavits:

> R. F. Marx—(R. Return, par. 14, p. 95, lines 10 to 26; par. 32, p. 111, lines 24 to 26; par. 33, p. 112, lines 23, 24);
>
> A. A. Kurze—(R. Return, par. 9, p. 130, line 24 to p. 131, line 24; par. 14, p. 134, line 18 to p. 135, line 10; par. 23, p. 139, line 25 to p. 140, line 10);
>
> J. J. Cohen—(R. Return, par. 27, p. 171, lines 13 to 17; par. 31, p. 174, lines 8 to 13).

9. Concerning the counterproposals of The Times-Mirror Company submitted April 9, 1945 (Exhibit B-29, Pet., pp. 113 et seq.), and particularly respecting Article 5, entitled "Wages" (Pet., pp. 120, 121), the Board's Petition alleges,

> "This proposed reduction was made in bad faith, and solely for the purpose of preventing the consummation of an agreement with the Union" (Pet., par. 10, p. 8).

This allegation is denied:

In the supporting Affidavits of the Answer:

R. F. Marx—(R. Return, par. 25, p. 103, lines 11 to 26);

J. J. Cohen—(R. Return, par. 27, p. 170, line 24 to p. 171, line 2).

10. That

> "Since May 10, 1946, although repeatedly requested by the Union to do so, respondents have refused, and continue to refuse, to reduce to writing and sign a contract with the Union embodying respondent corporation's prevailing practices and policies with reference to wages (commissions), hours, and working conditions of its newsboys in the bargaining unit * * *" (R. Pet., par. 32, p. 20).

The Board's version of the occurrence of "May 10, 1946," is recited at length in the Affidavit of William Axelrod, chairman of the Union negotiating committee (Pet., Ex. C, par. 44, pp. 187 to 190).

The averment is,

> "44. I asked Mr. Cosgrove if the Times was willing to sign a contract embodying present working conditions and practices and embodying the points we were in full agreement on, with the stipulation that the matter of wages or other points were to be the subject of further negotiations, and that when agreement was reached, they would become part of the contract. I said that such a move would help show the newsboys that the Times was not trying to stall. Mr. Cosgrove replied, 'I don't want to do that; we can get together on the whole issue.'
>
> "Mr. Cosgrove said, 'Well, right now the newsboys are making more commission from the Times than they are from the Examiner on the daily paper, and management might feel that in signing a contract, they

would be justified in requesting that the commissions be equalized.' I replied that it was very certain that the newsboys would not react favorably to a cut in their earnings." (R. Pet., p. 189).

A further averment of the Union negotiator is,

"On May 31, 1946, I wrote to Norman Chandler, President of The Times-Mirror Company (Ex. C-26 attached hereto), in which I told him that at the meeting of representatives of the Times and the Union on May 10, 1946 (see paragraph 44 above), I requested that the Times sign a written agreement with the Union covering the present wages (commissions), hours and working conditions of the newsboys in the bargaining unit, with the stipulation that proposals for changes in wages, hours and working conditions shall be the subject of future negotiations and when agreed to will become part of the contract, stating further that Mr. Cosgrove had refused to comply with my request and that I was therefore formally renewing the same request of him." (Pet., Ex. C, par. 47, p. 190.)

The statement of the chairman of the Union negotiating committee that he had made such request is specifically denied:

In the supporting Affidavit:

T. B. Cosgrove (R. Return, par. 12, p. 188, line 17 to p. 189, line 3).

This request is alleged to have been made May 10, 1946, at an informal meeting not attended by collective bargaining committee members other than Mr. William Axelrod of the Union and Mr. R. F. Marx of the Times. The meeting was held upon the request of Mr. Axelrod who asked originally to have only three parties present and specifically requested

"that no reporter appear to make stenographic notes of the proceedings and * * * that nothing be said about the matter to the National Labor Relations Board officials" (R. Pet., Ex. C-29, p. 253).

Subsequent to May 10, 1946, meetings of the collective bargaining committees for the Union and Times-Mirror Company were held

July 12, 1946 (R. Return, p. 109, line 23).

July 16, 1946 (R. Return, p. 111, line 10).

July 25, 1946 (R. Return, p. 112, line 10).

August 8, 1946 (R. Return, p. 114, line 8).

August 22, 1946 (R. Return, p. 115, line 9).

The various proposals and counterproposals of the two committees and the various agreements and disagreements regarding the same were discussed at length at these meetings in an effort to arrive at a contract. No suggestion of abandoning negotiations for a contract and formulating an agreement reciting merely the existing practices of the parties appears in the record of these meetings.

The statement is contradicted by averments appearing:

In the supporting Affidavits:

R. F. Marx—(R. Return, pars. 31 to 36, incl., pp. 109 to 117);

A. A. Kurze—(R. Return, pars. 22 to 26, incl., pp. 138 to 145);

J. J. Cohen—(R. Return, pars. 17 to 22, incl., pp. 161 to 169).

Since August 22, 1946, petitioners herein have received no request of any kind from the Union committee (R. Return, par. 37, p. 117, lines 18 to 20).

Point 3

Facts admitted in the answer and supporting affidavits relevant to the issues joined in the pleadings.

1. The Petition alleges:

> "At a later date, as appears in paragraph 28, below, respondent corporation, after one of the other three newspapers involved in the Board proceeding which culminated in the present Decree contracted with the Union for a raise in the rate of commission of its newsboys, unilaterally and without consultation or bargaining with the Union, *raised the wage scale* of its newsboys to the rate arrived at between the Union and the other newspapers by contract" (R. — Pet., pp. 8, 9).
>
> "28. On March 29, 1946, the Union entered into an agreement with Hearst Publications, Inc.—Los Angeles Examiner Department, publishers of a morning newspaper which competes with the newspaper published by respondent corporation. This contract provides that newsboys selling the Examiner on Sunday mornings shall receive a commission of 4 cents per paper (Exhibit B, paragraph 37; Exhibit C, paragraph 7). Thereupon on April 6, 1946 respondent corporation, without notification to the Union or prior bargaining with it, increased the rate of commission it pays its newsboys for selling its newspaper on Sunday morning from 2½ cents to 4 cents * * *" (R. — Pet., par. 28, p. 19).

The admitted facts respecting this item appear in the verified Answer to the Petition. They disclose that on April 7, 1946, the price of the Sunday issue of the Los Angeles Times was raised from 10 cents to 15 cents per copy, and forthwith the Times newsboys' commission was raised from 2½ cents to 4 cents per copy; that the raise in the price of the Sunday edition of the Los Angeles Times had not been made known publicly prior to April 7, 1946; that an increase in the newsboys' commission due

to increase in price from 10 to 15 cents had not been the subject of discussion among members of the negotiating committees; and that at the time of the raise of the commission petitioners herein had no knowledge of the execution under date of March 28, 1946, of a contract between the Newsboys Union and the competing morning paper, the Los Angeles Examiner (R. — Return, par. 22, pp. 18 & 19).

The commission to the newsboys on the sale of the Sunday edition of the Los Angeles Times at 15 cents per copy, never having been considered, the plan to increase the price of the Sunday edition from 10 cents to 15 cents per copy not having been known publicly prior to the date of increase, of necessity could not have been the subject of collective bargaining negotiations. A new condition arose which required a new solution.[9] After the practice was established it might become the subject of collective bargaining. Actually it later did become the subject of collective bargaining (R. —— Return, p. 107, lines 24 to 26; p. 168, lines 4 to 6). It could not be the subject of collective bargaining prior thereto. Under these conditions an increase in the commission commensurate with an increase in the selling price and contemporaneous with it is thought by your petitioners to be an evidence of good faith, and not an indication of contumacious conduct.

Unilateral action of the employer in granting pay increases may be proper and not evidence of bad faith in collective bargaining. Thus, where the raises were merely adjustments or in fairness to the employees were justified, unilateral action of the employer does not constitute bad faith.[9] Unilateral pay increases which do not have the effect of discouraging collective bargaining or union memberships are not violative of the Act; [10] similarly, where

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[9] *N. L. R. B.* v. *Whittier Mills Co.* (C. C. A. 5), 123, F. (2d) 725, 728.
[10] *Matter of Sam Jackson*, 34 N. L. R. B. 194, 202.

there was no purpose of by-passing the union,[11] or where the negotiations were temporarily in suspension.[12]

Something more than the mere unilateral action on the part of the employer must be shown.

2. The Petition alleges:

> "On and after October 9, 1944, respondents refused to meet with a negotiating committee representing the Union which had among its members any person who was not a member of the Union * * *" (R. — Pet. 2, p. 5).

The respondents did not refuse to meet with a negotiating committee which had among its members a person other than a member of the Union. The respondents refused to negotiate with a committee consisting of the designated committee of the Newsboys Union and a group of four other individuals representing three unions other than the Newsboys Union.

The facts relative to the allegation of the Petition which are admitted in the Answer and supporting Affidavits are to this effect:

On October 4, 1944, the Union advised petitioner R. F. Marx, chairman of Times collective bargaining committee, that on October 9

> "We [the Union] wish our bargaining conferences to begin" (R. — Pet., Ex. B-12, p. 86).

Prior thereto, on, to wit, October 6, 1944, by telephone, the Union had advised the secretary to petitioner R. F. Marx that the Union collective bargaining committee would consist of four principals and four alternates, naming them, that each was engaged in street sales of Los Angeles news-

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[11] *Matter of Montgomery Ward & Co., Inc.*, 39 N. L. R. B. 229, 241.
[12] *Matter of Westchester Newspapers, Inc.*, 26 N. L. R. B. 630, 642.

papers, and known by petitioners herein to be members of the Los Angeles Newsboys Union (R. — Return, p. 84, lines 2 to 21).

Previously (September 7, 1944) the Union in writing had advised that it

> "would have a five man negotiating committee from the Newsboys Local No. 75, which may from time to time be augmented by representatives from either the Los Angeles Industrial Union *Council* or from our *attorneys,* Katz, Gallagher & Margolis. Members of this committee, the *Council representatives* and *attorneys* will be the only ones authorized or permitted to speak at the negotiations. Observers will be permitted for the sole purpose of observation but not for participation" (R. — Pet., Ex. B-7, p. 69).

On October 9, 1944, the Times negotiating committee, being petitioners R. F. Marx, A. A. Kurze, and J. J. Cohen appeared at the time and place chosen by the Union to begin collective bargaining negotiations; that at said time and place a representative of the Furniture Workers Union, two representatives of the Newspaper Guild, and a representative of the Utilities Union were in attendance and insisted on participating in the collective bargaining negotiations; that petitioners herein, members of the Times-Mirror negotiating committee, expressed a willingness to carry on collective bargaining negotiations with the persons identified by the Union in its telephone message of October 6, 1944, and its letter of September 7, 1944, (R. — Pet., Ex. B-7, p. 69), representing the Newsboys Union, but not with persons representing other Unions; that the Times-Mirror negotiating committee were advised by their counsel that they should not negotiate with representatives of unions other than the Union designated in the Decree of the Court as the exclusive bargaining agent for Times newsboys; that the Times negotiating committee were thereupon

advised by the Newsboys Union committee and the representatives of the three other unions that they would be cited for refusing to bargain; that they were given twenty-four hours within which to agree to negotiate with all Union representatives then present; that the meeting adjourned.

That petitioner R. F. Marx on the same day (October 9, 1944) dispatched a registered mail letter, special delivery, to the chairman of the Newsboys Union (R. — Pet., Ex. B-14, pp. 88 to 90), reciting the occurrences of earlier in the day, declaring his belief that

> "• • • it is as much a violation of the Decree to bargain with any other than the exclusive representative as it is to refuse to bargain with the exclusive representative," [13]

declaring a wish to comply with the Decree and a belief that participation in collective bargaining by representatives of unions other than the Union designated in the Decree is a violation thereof; that the question is essentially a legal problem and suggesting that the matter be considered by counsel for the Union and counsel for the Los Angeles Times.

That the following morning at 9:00 A. M. petitioner R. F. Marx called the chairman of the Union negotiating committee by phone and, being advised that said letter had not arrived, read the same over the telephone to the Union committeeman.

These facts are set forth in more detail

In the Answer:
R. — Return, pars. 4, 5, & 6, pp. 5 to 7.

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[13] "• • • the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with the other." *Labor Board* v. *Jones and Laughlin*, 301 U. S. 1, 44.

In the supporting Affidavits:

R. F. Marx—(R. — Return, pars. 5 & 6, p. 84, line 2 to p. 87, line 5);

A. A. Kurze—(R. — Return, par. 4, p. 126, line 16 to p. 128, line 11);

J. J. Cohen—(R. — Return, par. 4, p. 152, line 12 to p. 154, line 8).

That the Newsboys Union considered the contention of the Times a *bona fide* if not a correct one is disclosed by the facts—

(a) The Union declined the suggestion of petitioner R. F. Marx that the problem, being a legal one, should be submitted to counsel for the Union and the Los Angeles Times (R. — Pet., Ex. B-14, p. 90). At this time, Mr. Isserman, labor relations legal adviser to C. I. O., was present at the morning conference and had participated in the discussion of the problem. In fact he had requested and obtained an interruption of the proceedings in order to check the matter with the Regional Director of the Los Angeles Office of the NLRB (R. — Return, p. 86, lines 8 to 13).

(b) On November 14, 1944, the Union advised the Times that they were ready to renew bargaining conferences; that their *committee would consist of members of the Newsboys Union;* and that one of the gentlemen who had appeared at the meeting of October 9, 1944, representing other Unions would not appear

"as a representative of the C. I. O. Council." (R. — Pet., Ex. B-15, pp. 90 to 91).

This decision of the Union was in accord with their letter to the four newspaper publishing corporations of September 7, 1944 (R. — Pet., Ex. B-7, p. 69). Negotiations were afterward conducted accordingly (R. — Return, par. 2, p. 89).

National Labor Relations Board through its Regional Director, Mr. Stewart Meacham of Los Angeles, having been in conference with Mr. Isserman, C. I. O. counsel, on the morning of October 9, 1944, respecting this technical problem and petitioners' contention relative thereto (R. — Return, p. 86, lines 8 to 22), the ensuing delay of the Board until September 10, 1946 (two years lacking one month), in charging that petitioners' contention constituted contumacious conduct should not have received the approval of the court.[14]

3. The Petition alleges:

> "From July 14, 1944 the date on which the Union requested respondents to bargain collectively with it, to December, 1944, respondents resorted to dilatory and evasive maneuvers calculated to and which did, in fact, delay negotiations and prevent genuine collective bargaining from taking place * * *" (R. — Pet., p. 5, par. 1).

This period is divided into two intervals, viz.:

(1) July 14, 1944, to October 4, 1944; and

(2) October, 1944, to December, 1944.

The second or latter of these two intervals has been the subject of discussion heretofore in the immediately preceding comment number 2 (*ante*, pp. 27 to 31).

The admitted facts respecting the first period, July 14, 1944, to October 4, 1944, are:

On July 14, 1944, approximately one month after the Decree directing collective bargaining negotiations, the Union directed a communication to all four Los Angeles newspaper publishing companies suggesting a meeting to

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[14] *N. L. R. B.* v. *Potash & Chemical Corp.* (C. C. A. 9), 113 F. (2d) 232, 236.

discuss the Court Decree (R. — Pet., Ex. B-1, p. 63). On July 20, 1944, the Times answered the communication (R. — Pet., Ex. B-2, p. 63); on August 1, 1944, the Times again directed a communication to the Union (R. — Pet., Ex. B-4, p. 65) in response to the Union's communication of July 21, 1944 (R. — Pet., Ex. B-3, p. 64).

On August 24, 1944, and again on September 7, 1944, the Union again directed communications to all four Los Angeles newspaper publishing companies (R. — Pet., Exhs. B-5 and B-7, pp. 65 and 68). The Los Angeles Times replied to each of these letters on August 31, 1944, and September 16, 1944, respectively (R. — Pet., Exhs. B-6 and B-8, pp. 66 and 70).

This correspondence related to the suggestion of the Union that collective bargaining be carried on by the four newspaper publishers jointly. The publishers insisted that the collective bargaining negotiations be conducted with the newspaper publishing companies individually and not jointly. Letters to the same effect from the three Los Angeles newspapers other than the Times are dated August 31, 1944, September 12, 1944, and September 18, 1944 (R. — Return, pp. 56 and 57).

On September 23, the Union advised petitioner R. F. Marx, as Circulation Manager of the Los Angeles Times, that the Union

> "are ready to bargain with you for your employees alone. *While it remains our firm belief that joint bargaining between the Union and all publishers is most desirable,* we cannot and would not try to compel it" (R. — Pet., Exh. B-9, p. 72).

On October 4th the Union advised petitioner R. F. Marx, as Circulation Manager of the Los Angeles Times, as follows:

"In reference to our telephonic communication October 3. Please be advised that arrangements have been made for use of the Studio Hall, Embassy Auditorium 11 A. M., October 9, 1944 at which time, we wish our bargaining conferences to begin" (R. — Pet., Ex. B-12, p. 86).

No intimation appears in any of the correspondence that up to this time any party in interest had dealt with another party in interest in anything other than the utmost good faith. Waiting one year and eleven months to charge that these negotiations constitute contempt on the part of petitioners herein should not be an approved practice.[15]

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.[16]

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JOHN N. CRAMER,
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Of Counsel.

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[15] *N. L. R. B.* v. *Potash & Chemical Corp.* (C. C. A. 9), 113 F. (2d) 232, 236.

[16] "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of Court." *J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332, 341.